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cc
Subject Proposed Bankruptcy Rule 1017 1

07-BK-021

Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20544

sent to: <Rules_Comments@ao.uscourts.gov>

Re: Proposed Bankruptcy Rule 1017.1
Exemption from Pre-Petition Credit Counseling Requirement

Dear Mr. McCabe:

I would like to take this opportunity to comment on the proposal to adopt a new Bankruptcy Rule, Rule 1017.1, concerning procedures associated with the certification submitted under § 109(h)(3) of the Bankruptcy Code for a temporary waiver of the requirement for pre-petition credit counseling The proposal to set a time limit for filing objections to the certification is a good one because it will bring some type of "closure" to the issue and eliminate the possibility that someone might attempt to raise the issue of eligibility much later in the case, thereby attempting to bring it to an end for strategic reasons. I am, however, concerned about the deadline that has been selected – fourteen (14) days – especially in light of the proposal that the court enter any order, whether in response to such a motion or on its own initiative, within twenty-one (21) days of the date the certification is filed; that date, of course, is supposed to be the date of the petition. Such brief time-frames will not give creditors an appropriate opportunity to explore whether a debtor actually qualifies for the exemption and will not give debtors an effective opportunity to respond to whatever concerns might be raised by either the court or a moving party.

My own experience in reviewing these certifications has shown that, particularly for pro se debtors, they are often ambiguous or incomplete. Furthermore, the requirements for demonstrating both sufficient exigency (§109(h)(3)(A)(i)) and unsuccessful attempts at obtaining credit counseling (§109(h)(3)(A)(ii)) are not as clear as one might wish. For this reason, many certifications often overlook or muddle details that could and would be clearly stated if the debtor was given the opportunity to try again after having been informed of the shortcoming. Putting a twenty-one (21) day window on the time within which the court must pass on the sufficiency of the certification will undermine the debtor's opportunity to correct or clarify the document and, by doing so, avoid dismissal of the case. Similarly, giving creditors only fourteen (14) days within which to raise the issue will deprive them of any meaningful opportunity to investigate the underlying facts concerning whether the debtor qualifies for the exemption, and may prompt the filing of objections that could have been avoided had there only been an opportunity to inquire further.

If the issue is not raised by a creditor until the fourteenth day, requiring the court to rule within the required 21-day window does not seem to provide sufficient time to allow the debtor to respond or for the court to consider such a response. Admittedly, if the court acts on its own initiative shortly after the case is filed this would provide a greater opportunity for the debtor to respond, but it still is not a schedule which will be able to accommodate any type of delay, whether in connection with initiating the inquiry, service of any notice or order to show cause concerning it, receiving and then reviewing any response that the debtor might offer. When one remembers that pro se filers will not be participating in the exchange through the court's ECF System, but will, instead, have to rely upon service by mail through the BNC, the amount of time they will have to respond will be shorter than it seems.

The commentary to the proposed rule seems to suggest that the twenty-one (21) day deadline is somehow tied to the requirement that a debtor seeking the exemption must obtain the required credit counseling and file a certificate demonstrating that fact within thirty (30) days of the date of the petition. I would submit that such a tie is not necessary. A debtor will either qualify for a waiver of the pre-petition counseling requirement, or not, based upon the facts as they existed as of the date of the petition. Subsequent events, or even a request for an extension of the thirty (30) day deadline, will not change whether the debtor originally met the threshold requirements for the exemption. If the debtor qualifies they are expected to obtain the requisite credit counseling and file the required certificate within thirty days after the petition. Nonetheless, doing so will not make a debtor eligible to proceed if it did not originally meet the threshold requirements for the exemption – exigent circumstances and unsuccessful attempts to obtain credit counseling before filing. If they do not fulfill those requirements the case should be dismissed, regardless of whether they obtain counseling after the petition was filed.

In light of all this, the very short fourteen and twenty-one day deadlines established by the proposed rule are unnecessarily brief. While any questions concerning the debtor's qualification for the exemption from credit counseling certainly need to be asked and answered quickly, there is such a thing as too much haste. Rather than establish a deadline by which the court must rule, it would seem more appropriate to establish a deadline by which the inquiry should be initiated –

whether by the court or by a party in interest – and then allow the individual courts the opportunity to determine the issue in such a manner and following such proceedings as they deem most appropriate. If the issue is going to be raised by a creditor or other party in interest, an appropriate deadline for filing an objection to the certification would seem to be shortly after the 341 meeting – in much the same way § 704(b)(1)(A) gives the U.S. Trustee ten days after that meeting to file a statement as to whether a case is presumptively abusive. This would give them the opportunity to explore any issues associated with the debtor's qualification for the waiver at the 341 meeting and may completely eliminate the need to file an objection, thus sparing the court a potentially unnecessary hearing. If the issue is going to be raised by the court, a somewhat longer deadline – say thirty days after the 341 meeting, similar to that found in § 707(b)(1)(B) – might be appropriate. This would give the court the ability to wait to see if creditors were going to raise the issue before doing so itself and still provide sufficient flexibility to accelerate the process if it felt doing so was necessary. (Having the deadlines mirror those found in §707(b)(1) also has the virtue of avoiding bringing additional complexity to the bankruptcy process by creating yet another layer of independent deadlines.) In either situation, however, I would not establish a deadline by which the court was required to rule. I think most judges can be relied upon to recognize the importance of the issue and to decide it with appropriate dispatch.

Thank you for your consideration.

Respectfully yours,

Robert E. Grant, Judge
U.S. Bankruptcy Court
Northern District of Indiana